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BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

DEPARTMENT OF TRANSPORTATION  
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DOCKET SECTION

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Application of

AMERICAN AIRLINES, INC.

OST-97-2081 -10

under 49 U.S.C. § 40109 for exemption  
(U.S.-Colombia and Route Integration)  
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Application of

AEROVIAS NACIONALES DE COLOMBIA, S.A. :

OST-97-2083 -10

for an exemption from 49 U.S.C. § 41301  
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Joint Application of

AMERICAN AIRLINES, INC. and :  
AEROVIAS NACIONALES DE COLOMBIA, S.A. :  
("AVIANCA") :

Undocketed

for Statements of Authorization under 14 C.F.R. :  
Parts 207 and 212 (Reciprocal Code-Sharing Services) :  
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CONSOLIDATED SURREPLY OF  
CONTINENTAL AIRLINES, INC.  
AND MOTION FOR LEAVE TO FILE LATE  
AN UNAUTHORIZED DOCUMENT

Communications with respect to this  
document should be sent to:

Rebecca G. Cox  
Vice President, Government Affairs  
CONTINENTAL AIRLINES, INC.  
1300 I Street, N.W., Suite 950 East  
Washington, D.C. 20005

R. Bruce Keiner, Jr.  
Lorraine B. Halloway  
CROWELL & MORING LLP  
1001 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-2595  
(202) 624-2500

11pgs.

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American and Avianca<sup>1</sup> argue that the Department should approve their alliance despite the fact that the U.S.-Colombia market will remain closed to any competitive response by Continental. Approval would allow the two carriers which together dominate the U.S.-Colombia market (American and Avianca) to prepare "for liberalization of the U.S.-Colombia aviation relationship" (American Reply at

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<sup>1</sup> Common names of carriers are used.

February 25, 1997

10) by so completely dominating the market that new competition will be impossible when and if “a more open aviation relationship between the United States and Colombia” (Avianca Reply at 4) arrives. Clearly, the two applicants plan to erect commercial barriers to competition which will be as effective in blocking true competition as the legal barriers to entry now established in the U.S.- Colombia aviation agreements. The Department must not become an unwitting co-conspirator.

The American and Avianca replies distort the Department’s policy on code sharing and ignore the key fact that the combination of dominance and closed skies together require denial of a code-share arrangement between two already dominant carriers in a limited-entry market. The Department has no choice but to disapprove the American and Avianca applications because any other result would nullify the U.S. policy objective of fostering competition in international markets and signal airlines throughout Latin America that the U.S. government will permit the dominant U.S. airline throughout the region to join forces with the dominant airline in each country to prevent new competition.

In support of its position, Continental states as follows:<sup>2</sup>

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<sup>2</sup> Continental moves for leave to file this unauthorized surreply and to file one day late. The consolidated surreply responds to arguments made in the replies of American and Avianca, and fairness dictates that the Department consider Continental’s answer to those erroneous arguments. Accepting the consolidated surreply will provide a more complete accurate record upon which the Department can reach its determination.

1. **The Anticompetitive Effects of the American/Avianca Code Share Far Outweigh Any Public Benefits**

American and Avianca cite increased U.S.-Colombia access and “expanded marketing of [their] services” as “substantial public benefits” from approval of their code share. This claim, like Avianca’s assertion that “[t]he proposed code-share is another important step on the road to a more open aviation relationship between the United States and Colombia,” is absurd. While approval will provide significant private benefits for American, which already controls 74% of the U.S. flag seats and Avianca, which already controls 72% of the Colombian-flag seats, granting either carrier greater access will simply make it easier for those two carriers to eliminate what competition they now face in the U.S.-Colombia market. Approval would substantially reduce network competition for U.S.-Colombia and U.S.-South America services because it would enhance American’s already dominant network and perpetuate American’s dominance of U.S.- flag opportunities in Colombia and South America markets. The alliance also would preclude any other U.S. carrier from linking its network to Avianca, and the combined strength of American and Avianca could force other carriers to drop out of U.S.-South America markets. American itself has advocated “close scrutiny -- and disapproval -- of reciprocal distribution pacts in international aviation markets where the arrangements act as a device for excluding unaffiliated U.S. carriers and rewarding foreign -flag carriers for monopolistic practices at home.” (Comments of American Airlines, Inc., Docket 49223 (April 1, 1994) More

recently, American argued successfully against the expansion of Continental/Alitalia cooperative services because “Italy continues to maintain a severely restrictive bilateral agreement that denies other U.S. airlines the routes and frequencies they need to mount effective competitive services.” (Consolidated Answer of American in Dockets OST-95-348 and 95-347, dated October 8, 1996, at 2) The same rationale applies here and compels outright denial of the American and Avianca application in light of the highly restrictive U.S.-Colombia bilateral regime. Because the American/Avianca arrangement is so blatantly anticompetitive, however, it would have to be denied even under a liberalized U.S.-Colombia agreement.

**2. The Department Has Not Approved Extensive, Extra-Bilateral Code Sharing Between The Dominant Carriers In Limited Entry Markets.**

American’s analysis of the Department’s precedents of code-share approvals in limited-entry markets is seriously flawed. The Department has approved code sharing in markets where access is closed to U.S. carriers only when approval of the code-share alliance at issue will itself provide entry by the U.S. code-share partner, as the cases American relies on prove.

For example, when it approved the original Continental/Alitalia code-sharing arrangement, the Department specifically “found that the code-share arrangement increased competition in the U.S.-Italy market by enabling a fifth U.S. carrier service in the Italy market and a third U.S. carrier service from New York.” (Order 95-11-20 at 4, citing Order 94-10-27 at 4 and 5) Similarly, the

Department approved a United/Saudi code share because “the U.S. will gain an additional carrier in the market, which is currently being served directly by one U.S. carrier.” (Order 96-10-15 at 3) In approving the Delta/Virgin code-share arrangement the Department recognized that, “One of the most important benefits will be the offering of service to London’s Heathrow Airport by a third U.S. combination carrier, for the first time since Bermuda 2 was amended in 1980.” (Order 95-2-28 at 7) Similarly, the Department approved Delta’s code share with Varig in part because the arrangement enabled “a fourth U.S. carrier to offer service in the U.S.-Brazil market.” (Order 94-3-33 at 5) <sup>3</sup>

Those cases stand in stark contrast to the extensive extra-bilateral third/fourth-freedom and beyond code sharing proposed by American and Avianca, which between them already dominate the U.S-Colombia market, and to Avianca’s requests for authority to serve many new U.S. points on an extra-bilateral basis as part of the arrangement.<sup>4</sup> Indeed, this case is similar to, and raises the same types of “serious competitive issues” the Department has identified in connection with American’s proposed alliance with the TACA Group carriers. (Order 97-1-15

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<sup>3</sup> The code-sharing approved for Delta and Aer Lingus was limited to one transatlantic route and allowed Delta to offer new nonstop U.S. flag competitive service in the U.S.-Ireland market. (See order 96-11-19) Significantly, the U.S.-Ireland market is open to multiple designations and unlimited frequencies.

<sup>4</sup> American would also gain exclusive U.S.- flag access to Medellin and the ability to expand its dominance of the U.S.- South American market by code sharing beyond Colombia to six other South American countries.

at 4) Here, as in the U.S.-Central America markets, American and its foreign code-share partner are “the largest carriers in the markets at issue, and American [is still] the only U.S. airline with a hub at Miami, the dominant gateway for” service in the market covered by the agreement. (Id.) The anticompetitive effect of the extensive proposed American/Avianca alliance is heightened because American and Avianca already control 35% and 34%, respectively, of the seats available in the restricted U.S.-Colombia market, and the U.S. Colombia bilateral agreement precludes new U.S. combination-service entry and freezes capacity for the next two years.<sup>5</sup> The Department has never approved similar code sharing by the dominant carriers in a highly restricted market, and doing so clearly would be contrary to the public interest.

**3. The Department Has Considered Market Shares and Regional Strength of Code-Share Partners, and it Should Do So Here**

American also errs in contending that the Department has not previously considered either the dominance or market strength of potential code-share partners. Indeed, presented with American’s pending application for approval of a mega alliance with the TACA Group carriers, the Department readily concluded that further investigation was necessary precisely because of the dominance of the applicants in relevant markets. In the Department’s words:

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<sup>5</sup> Another measure of the American/Avianca dominance is the fact that the two carriers have more ticket counter positions at Bogota than all the other airlines serving Bogota together.

The applications raise competitive issues requiring further examination, primarily because of the position currently held by American and the TACA Group Carriers in the U.S.-Central American market.

(Order 96-11-12 at 6) The Department reiterated the “serious competitive issues” raised by the American/TACA arrangement two months later, explaining:

In particular, we noted the dominant positions held by American and the foreign carriers involved in the alliance in the Central American market. Those carriers were the largest carriers in the markets at issue, and American was the only U.S. airline with a hub at Miami, the dominant gateway for U.S. -Central America service.

(Order 97-1-15 at 4)

American is also wrong in claiming that the Department has “explicitly rejected” the theory that American’s requests for South American route authority or frequencies should be denied because of the harmful effects approval would have on the competitive situation in Latin America as a whole. As the Department said six months ago when it refused to award American more U.S.-Peru frequencies:

when we compare American with other carriers that operated in the U.S.-Lima market during calendar year 1995, American carried 2.8 times more passengers than the next closest carrier (Aeroperu) and 4.2 times more than the next closest U.S. carrier (United). In the U.S.-South and Central American market American carried 1.7 times more passengers than the next closest carrier (Mexicana de Aviacion) and 4.7 times more than the next closest U.S. carrier (Continental).

(Order 96-6-53 at 7) (emphasis added)

Ignoring market share and regional strength of proposed code-share partners would be contrary to the U.S. International Air Transportation Policy Statement, which is intended to help create a market in which all types of international service can coexist, not just code-sharing agreements that monopolize international air travel markets.

In short, as indicated by our domestic experience, a variety of service forms -- global networks with carriers participating either as the sole provider or as participant in a joint network, and regional niche carriers -- can exist in the international aviation market and the competition among these services will enhance consumer benefits through efficient operations and low fares. Thus, our international aviation strategy should provide opportunities for all of these forms of service so that we can realize the benefits from maximum competition among them.

(60 Fed. Reg. 21841, 21843, May 3, 1995) The Policy Statement also specifically warns against the possible anticompetitive results of some code-share arrangements, noting that, "The greater traffic access of participants may give them considerable competitive muscle, and we may need to watch for harmful effects on competition." (60 Fed. Reg. at 21843) The Department needs to look no further than the American/Avianca proposal to see the harmful effects on competition.

For the foregoing reasons, Continental urges the Department to dismiss or deny the applications of American and Avianca promptly.

Respectfully submitted,

CROWELL & MORING LLP

By: R. Bruce Keiner, Jr.  
R. Bruce Keiner, Jr.

By: Lorraine B. Holloway  
Lorraine B. Holloway

Counsel for  
Continental Airlines, Inc.

CERTIFICATE OF SERVICE

I certify that I have today served a copy of the foregoing surreply and motion on counsel for American and Avianca and all parties served with the American and Avianca replies in accordance with the Department's Rules of Practice.

Lorraine B. Holloway  
Lorraine B. Holloway

February 25, 1997

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CONTINENTAL SERVICE LIST

Carl B. Nelson, Jr.  
Associate General Counsel  
American Airlines, Inc.  
Suite 600  
1101 17th Street, N.W.  
Washington, D.C. 20036

William Scherrer  
Senior V.P. & General Manager  
Emery Worldwide Airlines, Inc.  
Dayton International Airport  
One Emery Plaza  
Vandalia, OH 45377

Joel Stephen Burton  
Ginsburg, Feldman & Bress  
Suite 800  
1250 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(for United)

Robert Cohen  
Shaw, Pittman, Potts & Trowbridge  
2300 N Street, N.W.  
Washington, DC 20037-1 116  
(for Delta)

Robert D. Papkin  
Charles F. Donley  
Squire, Sanders & Dempsey, LLP  
Suite 400  
1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20044  
(for Avianca)